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FEDERAL COMMUNICATIONS COMMISSION  
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**By Hand**

Barbara A. Kreisman, Esq.  
Chief, Video Services Division  
Mass Media Bureau  
Federal Communications Commission  
1919 M Street, N.W.  
Room 702  
Washington, D.C. 20554

Re: MM Docket No. 93-191  
Amendment of Section 73.606(b), Table of Allotments,  
TV Broadcast Stations (Pueblo, Colorado)

Dear Ms. Kreisman:

The University of Southern Colorado ("USC") and Sangre de Cristo Communications, Inc. ("SCC"), by their attorneys, hereby respond jointly to your August 10, 1998 letter<sup>1/</sup> regarding the above-referenced channel exchange proceeding.<sup>2/</sup> This letter provides the technical information requested in your letter concerning USC's and SCC's 1992 Joint Petition for Rule Making proposing the exchange of USC's Channel \*8 television assignment (KTSC(TV)) for SCC's Channel 5 television assignment (KOAA(TV)).

You state in your letter that the purpose of providing this information is so that the Commission can "comply with the Court's remand" in *Sangre de Cristo Communications, Inc. v. FCC*, No. 97-1030, slip. op., April 17, 1998 ("SCC"). Although SCC and USC are happy to assist the Commission staff in complying with the Court's remand, SCC and USC respectfully

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<sup>1/</sup> USC and SCC request that the Commission update its records to indicate that Malcolm G. Stevenson is counsel for USC. Mr. Stevenson's address is provided at the conclusion of this response.

<sup>2/</sup> This response is being filed pursuant to a 10 day extension of time granted by the Mass Media Bureau.

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question whether updated technical information is necessary to resolve the issues raised in that decision. The Court's remand was unambiguous, directing the Commission to explain better why

'the public interest benefit of the integrity of the TV Table of Allotments and the minimum spacing rules' would be outweighed by USC's short-spaced broadcasts but not by Sangre de Cristo's. The FCC may well decide to factor the commercial status *vel non* of an applicant into its short-spacing waiver decisions, as it appears to have done, or it may develop an alternative rule. Whatever the Commission decides, it must better explain the basis for its action (particularly in light of its past practice which did not consider the commercial/noncommercial status of an applicant) than it has done. . . . And if the FCC does elect to consider the commercial/noncommercial status of an applicant, it must ground its modification in a manner consistent with the First Amendment.

SCC, slip. op. at 10 - 11 [citations and footnotes omitted].<sup>3/</sup> The August 10 letter also does not explain how the information requested will assist the Commission in complying with the Court's explicit directive particularly given that substantially all of this information is already part of the record in this case.<sup>4/</sup> Nonetheless, SCC and USC are pleased to update the information already on file as we believe that it will advance this proceeding which has been pending since September 1992.

***KOAA(TV), Channel 5, Pueblo, Colorado***

As a preliminary matter, we note that although the August 10 letter addresses the changes to each station's facilities separately, the contingent nature of the proposed channel exchange requires that they be considered as occurring simultaneously. Accordingly, the discussion herein and in the attached exhibits assumes, with respect to KOAA(TV), that KTSC(TV) will be

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<sup>3/</sup> A copy of the slip opinion is attached as Exhibit A.

<sup>4/</sup> See Petition of University of Southern Colorado and Sangre de Cristo Communications, Inc. for Issuance of Notice of Proposed Rulemaking to Exchange Channels, and accompanying Engineering Statement, filed Sep. 8, 1992; Joint Comments of the University of Southern Colorado and Sangre de Cristo Communications, Inc., MM Docket No. 93-191, filed Sep. 3, 1993; Joint Reply Comments of the University of Southern Colorado and Sangre de Cristo Communications, Inc., MM Docket No. 93-191, and accompanying Engineering Statement, filed Sep. 27, 1993; Joint Application for Review of University of Southern Colorado and Sangre de Cristo Communications, Inc., MM Docket No. 93-191, and accompanying Engineering Statement, filed Aug. 14, 1995.

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operating on Channel \*5 with KOAA(TV)'s currently licensed facilities (ERP of 100 KW and HAAT of 396 meters at the Baculite Mesa transmitter site northwest of Pueblo), and, with respect to KTSC(TV), that KOAA(TV) will be operating on Channel 8 with either the authorized or proposed facilities described below.

Further, it is essential that the Commission staff appreciate the unique yet critical context of the information presented herein concerning "loss of service." There will be no over-the-air service loss resulting from the proposed changes inasmuch as all areas currently served by KOAA(TV) with an over-the-air television signal will continue after the channel exchange to receive an over-the-air television signal from KTSC(TV) using the same transmitter and antenna already used by KOAA(TV). Accordingly, there will only be a change in program service in that those communities no longer receiving KOAA(TV)'s Grade B signal will receive KTSC(TV)'s noncommercial educational Grade B signal. The "loss area" that is created then involves the loss of over-the-air NBC service only. Moreover, because there is no loss of over-the-air television service, no white area will be created by the proposed exchange. Nor will any new gray area be created in connection with the facilities swap. A portion of the NBC loss area is already gray area because the communities therein currently receive only KOAA(TV)'s over-the-air signal. These communities will continue to receive one over-the-air signal (KTSC(TV) service) following the channel swap.

Attached to this letter as Exhibit B is the Engineering Statement of Cohen, Dippell & Everist, P.C. (the "Engineering Statement"). Figure 1 of the Engineering Statement depicts the current licensed facilities of KOAA(TV) on Channel 5 operating from Baculite Mesa, and KOAA(TV)'s proposed facilities on Channel 8, operating from Cheyenne Mountain (the preferred transmitter site for the dual city market of Colorado Springs-Pueblo). Figure 1 includes two sets of proposed facilities for Channel 8. The first is based on the construction permit (currently held by USC) authorizing operation of a television station on Channel 8 from Cheyenne Mountain using a Jampro antenna (FCC File No. BPET-900122KE) (the "Permit Facilities"). The second is based on the facilities proposed in USC's application to modify the Channel 8 construction permit to specify use of a Dielectric antenna (FCC File No. BMPET-931129KE) (the "Application Facilities").

KOAA(TV)'s operation with the Permit Facilities would create a gain in NBC service covering an area of 8,668 sq. kilometers and 1,272,075 people, and a loss of NBC service covering an area of 13,047 sq. kilometers and 23,012 people. With the Application Facilities, there would be a NBC service gain of 10,680 sq. kilometers and 1,438,796 people; the NBC service loss area would be only 10,430 sq. kilometers and 17,070 people. *See* Figure 1(b). As indicated in the relevant figures, much of the NBC loss area is located south of Pueblo on the fringe of KOAA(TV)'s current Grade B contour, and involves rural, sparsely populated areas. The Commission staff has previously ruled that these loss areas are "largely unpopulated" and

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that withdrawal of service would not have an adverse impact on the public interest.<sup>5/</sup> Notwithstanding the previous ruling of the Commission staff and the unpopulated nature of these areas, SCC and USC have previously demonstrated and demonstrate herein that any NBC service loss would be *de minimis* if not non-existent.

Figure 2 to the Engineering Statement depicts the other full power television services that would serve the NBC gain and loss areas, and Exhibit C hereto provides a tabulation of each of these stations' commercial/noncommercial status and network affiliation, if applicable. KOAA(TV) would provide a second NBC signal to a majority of the NBC gain area and a first NBC signal to a small portion of the NBC gain area in Lincoln County (assuming construction of the Application Facilities). As indicated in Figure 2(b)(1), six full power television stations currently provide service to portions of the NBC loss area. Following the proposed channel exchange, all of the NBC loss area will be served by one or more full power television stations given that KTSC(TV) will be operating on Baculite Mesa with KOAA(TV)'s currently licensed Channel 5 facilities. Thus, no white area or gray area will be created by the modification of KOAA(TV)'s license to specify operation on Channel 8.

In addition to service from full power television stations, the NBC loss area created by the Permit Facilities and the Application Facilities will be well-served by existing and proposed television translators, cable television service, and DBS service. At least 5 existing television translators (listed in Figure 2(c)(2)) currently provide commercial or noncommercial service to 10,423 people in the NBC loss area created by the Permit Facilities, and 10,012 people in the NBC loss area created by the Application Facilities. One of these translators, K15EC in Westcliffe, Colorado, rebroadcasts the signal of KOAA(TV). Thus, this community already receives over-the-air NBC service. As proposed in the parties' September 1993 Joint Reply Comments in this proceeding, KOAA(TV) also plans to construct five translators that would increase broadcast service to the NBC loss area created by the Permit Facilities by 11,267 people -- from 10,423 to 21,690 people -- and with respect to the Application Facilities by 6,003 people -- from 10,012 to 16,015 people. See Figures 2(d)(1) and 2(d)(2). This translator service substantially reduces the NBC loss area created by the Permit Facilities to 1,322 people and by the Application Facilities to 1,055 people.

Translator service in these outlying areas is supplemented by cable service and DBS service, further reducing and, in all likelihood, eliminating the remaining NBC service loss. In its Joint Reply Comments in this proceeding, USC and SCC demonstrated the availability of cable service to all counties within the NBC loss area, except for the communities of Cheraw, La Junta and Swink in Otero County, Aguilar in Las Animas County, and La Veta in Huerfano

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<sup>5/</sup> See Letter to Thomas Aube from Barbara A. Kreisman (Feb. 28, 1991).

County.<sup>6/</sup> As indicated in Exhibit D hereto, cable service is now available to both the communities of La Junta and Swink in Otero County and the community of Aguilar in Las Animas County. La Junta and Swink have a high cable penetration rate -- 81.4%. Aguilar in Las Animas County has a cable penetration rate of 69.6%.<sup>7/</sup> Total cable penetration in the State of Colorado is 76.7%.<sup>8/</sup>

Although Cheraw in Otero County, and La Veta in Huerfano County are not currently served by cable, DBS service is available to both communities. Included as Figure 1(c) to the Engineering Statement is a map depicting the counties contained within the NBC loss area identified by zip code. In Huerfano County, zip code 81089, where La Veta is located, the percentage of households subscribing to a DBS service is 16.01%, and in Otero County, zip code 81050, the percentage of households subscribing to a DBS service is 5.84%. Thus, it is clear that DBS service is available to viewers in these communities. Of course, KOAA(TV) plans to serve both La Veta and Cheraw with over-the-air translators which further increases the availability of KOAA(TV)'s signal to viewers in these communities. It also should be noted that as indicated in Figures 1(c) and 1(d), DBS service is available to each of the other counties in the NBC loss area. Indeed, the total DBS penetration rate for all of the counties combined is 27.9%.

There has been considerable argument in this proceeding both at the agency level and before the Court of Appeals regarding the loss of NBC service. USC and SCC reiterate here that KOAA(TV)'s proposals to mitigate or eliminate the NBC service loss are wholly consistent with established precedent. The Commission has explicitly recognized that in rural remote areas, the availability of translator, cable and satellite services can be used to reduce loss areas.<sup>9/</sup> There is simply no basis for the Commission to depart from its longstanding precedent in this case.

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<sup>6/</sup> See Joint Reply Comments of the University of Southern Colorado and Sangre de Cristo Communications, Inc. in MM Docket No. 93-181, Sept. 27, 1993, Engineering Statement of Cohen, Dippell & Everist, P.C., Table I.

<sup>7/</sup> *Television & Cable Factbook*, Cable Vol. 66 (1998). Information concerning penetration also was provided by the cable systems serving these communities.

<sup>8/</sup> *Television & Cable Factbook*, Cable Vol. 66 (1998).

<sup>9/</sup> See *KTVO, Inc.*, 57 RR 2d 648 (1984); *Elba Development Corp.*, 5 FCC Rcd 6767 (1990) (prior history omitted), *application dismissed*, 6 FCC Rcd 1564 (1991) (reiteration of policy that evidence regarding availability of cable, translators and the viewing of other television stations beyond their Grade B contour is acceptable for purposes of demonstrating elimination or reduction of white areas); *Coronado Communications Co.*, 8 FCC Rcd 159 (1992) (areas where translator service and cable television are available can be excluded in calculation of loss area); *Daytona Broadcasting Co.*, 59 RR 2d 1303, 1305 (1985); *Apogee, Inc.*, 59 RR 2d 941, 945 (1986); *Tele-Broadcasters of California, Inc.*, 58 RR 2d 223, 232, n.38 (Rev. Bd. 1985) (recognition of cable television as "tantamount to 'white area' television service").

***KTSC(TV), Channel \*8, Pueblo, Colorado***

Figure 3 to the Engineering Statement depicts KTSC(TV)'s current licensed facilities on Channel \*8 on Baculite Mesa, and its proposed facilities operating on Channel \*5 from Baculite Mesa with an ERP of 100 kW and 396 meters HAAT. As indicated in Figures 3 and 3(b), there will be no loss of noncommercial service. There will be a gain in noncommercial service of 16,317 sq. kilometers and 5,324 people. Figure 4 to the Engineering Statement depicts the other full power television services currently serving this gain area. Exhibit E hereto provides a tabulation of each of these stations' commercial/noncommercial status and network affiliation, if applicable. KTSC(TV) will be providing first non-commercial broadcast service to a significant portion of the gain area.

As indicated in USC's and SCC's channel exchange proposal, KTSC(TV)'s service gains are not limited to the areas and populations depicted on Figure 4. As part of the channel exchange, KTSC(TV) will receive funds from SCC to construct and operate a translator network on the Western Slope in Colorado. The Western Slope translators will bring first noncommercial broadcast service to an area of 512 sq. kilometers and 5,082 people. See Figure 5(b).

As part of the exchange, KOAA(TV) also will donate to USC its translator station, K30AA, operating on Channel 30 in Colorado Springs. K30AA has been used by SCC since 1979 to provide fill-in service to areas of Colorado Springs that KOAA(TV)'s signal cannot reach due to shadowing caused by terrain near Austin Bluffs in Colorado Springs and Security, a town to the south of Colorado Springs. The translator provides supplemental service to approximately 334,077 people and an area of 929 sq. kilometers in Colorado Springs. With this translator, KTSC(TV) will be able to improve significantly its service to these shadowed areas in Colorado Springs.

It is highly unlikely that the Channel 30 translator will be displaced as a result of analog television stations' conversion to digital television ("DTV"). The only possible impediment to K30AA's continued operation during and following DTV conversion would result from activation of a DTV allotment on Channel \*30 in La Junta, Colorado (population 7,637). Although the NTSC allotment for La Junta, Channel \*22, is currently vacant, the FCC allotted DTV Channel \*30 to that community in its *Sixth Report and Order* in the digital television proceeding.<sup>10/</sup> In its *Memorandum Opinion and Order on Reconsideration of the Sixth Report and Order*, however, the Commission did not allot DTV Channel \*30 or any other DTV channel

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<sup>10/</sup> *Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, Sixth Report and Order*, MM Docket No. 87-268, 12 FCC Rcd 14588, Appendix E-6 (1997).

to La Junta.<sup>11/</sup> At best then, it is uncertain whether the initial allotment of digital Channel \*30 is even relevant to the continued operation of K30AA. And, as shown in the Engineering Statement, even if the Channel \*30 allotment at La Junta was valid and was activated, the interference caused to either the La Junta DTV station or K30AA would be *de minimis*. See Engineering Statement at 6.<sup>12/</sup>

In sum, the proposed channel exchange will result in substantial service gains that outweigh the *de minimis* service losses. KOAA(TV) will have a NBC service gain of at least 1,272,075 people, enhancing its coverage of Colorado Springs, the largest city in its market, and providing a competitive NBC signal to the entire market. The NBC service loss will be *de minimis* at most given the availability of translator, cable and DBS service. No white or gray area will be created. KTSC(TV) will realize a gain of 5,324 people with no service loss. Combined with the service provided by the Western Slope translators, the total gain in noncommercial service will cover a population of 10,406. For a majority of the gain areas, KTSC(TV) will be providing first noncommercial broadcast service. Moreover, its use of K30AA will ensure that USC can reach the shadowed portions of Colorado Springs.

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<sup>11/</sup> *Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, Memorandum Opinion and Order on Reconsideration of the Sixth Report and Order*, MM Docket No. 87-268, 13 FCC Rcd 7418, Appendix E-5 (1998), *petitions for reconsideration pending*.

<sup>12/</sup> It also is unlikely that K30AA would be displaced by the operation of any new analog stations. Although there is an application pending before the Commission for authority to construct a new full power television station on Channel 32 to serve Pueblo, Colorado, it is uncertain when or if this application will be granted. The Channel 32 application was filed in 1996 (FCC File No. BPCT-960102KE), includes a request for waiver of the advanced television freeze, and was never placed on a cut-off list. Pursuant to the Commission's *Report and Order* on competitive bidding for broadcast licenses, this application would only be granted following an auction and the applicant would be required to compete with other parties in bidding for the license. *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, First Report and Order*, MM Docket No. 97-234, FCC 98-194, ¶ 69 (rel. Aug. 18, 1998).

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We hope that this information is helpful and expedites the resolution of this longstanding proceeding. If the parties can provide any additional information, please do not hesitate to contact us.

Respectfully submitted,

UNIVERSITY OF SOUTHERN COLORADO

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Enclosure

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Richard Hildreth, Esq. (Counsel for Pikes Peak Broadcasting Company)  
James Winston, Esq. (Counsel for AK Media Group, Inc.)



**Table of Exhibits**

|                  |   |
|------------------|---|
| <b>Exhibit A</b> | <i>Sangre de Cristo Communications, Inc. v. FCC</i> , No. 97-1030, slip. op., April 17, 1998. |
| <b>Exhibit B</b> | Engineering Statement of Cohen, Dippell & Everist, P.C.                                       |
| <b>Exhibit C</b> | Full Power Television Stations Providing Service to KOAA(TV) Gain and NBC Loss Area           |
| <b>Exhibit D</b> | Cable Service in NBC Loss Area  |
| <b>Exhibit E</b> | Full Power Television Stations Providing Service to KTSC(TV) Gain Area                        |

**EXHIBIT A**

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

## **United States Court of Appeals**

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Argued February 17, 1998

Decided April 17, 1998

No. 97-1030

SANGRE DE CRISTO COMMUNICATIONS, INC.,  
APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION AND  
UNITED STATES OF AMERICA,  
APPELLEES

PIKES PEAK BROADCASTING COMPANY AND  
AK MEDIA GROUP, INC.,  
INTERVENORS

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Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

No. 97-1032

UNIVERSITY OF SOUTHERN COLORADO,  
APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION AND  
UNITED STATES OF AMERICA,  
APPELLEES

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Appeals of an Order of the  
Federal Communications Commission

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*Scott D. Dailard* argued the cause for the appellants. *Malcolm G. Stevenson*, *Kevin F. Reed* and *Timothy J. O'Rourke* were on the joint briefs. *Lawrence M. Miller* entered an appearance.

*K. Michele Walters*, Counsel, Federal Communications Commission, argued the cause for the appellees. *Christopher J. Wright*, General Counsel, *Daniel M. Armstrong*, Associate General Counsel, and *C. Grey Pash, Jr.*, Counsel, Federal Communications Commission were on brief. *Robert B. Nicholson*, Attorney, United States Department of Justice, entered an appearance.

*Richard Hildreth*, *Andrew S. Kersting*, *James L. Winston* and *Walter E. Diercks* were on brief for joint intervenors AK Media Group, Inc. and Pikes Peak Broadcasting Company.

Before: WILLIAMS, HENDERSON and GARLAND, Circuit Judges.

Opinion for the court filed by Circuit Judge HENDERSON.

KAREN LECRAFT HENDERSON, Circuit Judge: Appellants University of Southern Colorado (USC) and Sangre de Cristo Communications, Inc. (Sangre de Cristo) seek to reverse a

ruling of the Federal Communications Commission (FCC or Commission) denying their channel exchange proposal. See *Amendment of Section 73.606(b), Table of Allotments, TV Broadcast Stations (Pueblo, Colorado)*, 11 F.C.C.R. 19,649 (1996); *Amendment of Section 73.606(B), Table of Allotments, TV Broadcast Stations (Pueblo, Colorado)*, 10 F.C.C.R. 7662 (MMB 1995). Because the FCC's rationale for its ruling is unclear, we vacate the ruling and remand for further proceedings.

## I.

USC is the licensee of noncommercial educational television station KTSC(TV), Channel \*8,<sup>1</sup> Pueblo, Colorado, which provides free public television service to television viewers in southern and western Colorado. USC's transmission facilities are located north of Pueblo at Baculite Mesa. Some Colorado Springs viewers could not receive transmissions from KTSC(TV) because of intervening terrain barriers so USC used a television translator<sup>2</sup> on an apparently unused channel (Channel 53) in order to reach those viewers. In August 1990, however, USC was required to stop using Channel 53 when a full power station began operating on that channel.

As a result, USC sought an FCC construction permit to allow it to relocate its tower facility to Cheyenne Mountain—a location which would enable the station to reach a greater portion of the Colorado Springs-Pueblo television market. Operation at the site, however, required a waiver of the FCC's minimum distance separation requirement for television broadcast stations, see 47 C.F.R. § 73.610, because the Cheyenne Mountain site is "short-spaced" both to station

<sup>1</sup> The FCC designates a channel reserved for noncommercial use by placing an asterisk (\*) immediately preceding the channel number. See 47 C.F.R. § 73.606.

<sup>2</sup> A television translator retransmits the signals of a television broadcast station to the viewing public. See 47 C.F.R. § 74.701(a). Translator stations can be displaced by a regular, full-power station. See 47 C.F.R. § 74.702(b).

KJCT(TV) in Grand Junction, Colorado (by 5.5 miles) and to a vacant channel allocation in Laramie, Wyoming (by 8.1 miles).<sup>3</sup>

In February 1991 the FCC's Mass Media Bureau (MMB or Bureau) granted a waiver to USC, explaining:

The Commission is mindful of the unique role played by many noncommercial television stations in providing public television service to wide areas. You have established that the University serves both the Pueblo and Colorado Springs areas and that it is therefore important that your television station do so as well. You have unsuccessfully attempted to find another translator to serve Colorado Springs, and it would not be possible at this time to seek a new television channel, since there is currently a freeze on the filing of new applications in that part of the country. Further, it does not appear that you could modify the facilities of your current site sufficiently to provide a viewable signal in Colorado Springs. Consequently, your only alternative is to seek a new site, and we believe you have demonstrated the unsuitability of any other sites from which you could serve both communities. We further note that, while there would be some loss areas to the south and east of Pueblo, these areas are largely unpopulated. Additionally, we agree that the mountainous terrain and your offer to reduce effective radiated power to the north and west would greatly reduce the possibility that objectionable interference to the Grand Junction station or to a future station in Laramie would occur. Finally, we note that [nearby commercial] Station KJCT(TV) in Grand Junction has not opposed your proposal. Therefore, we believe that waiver of Section 73.610 is warranted.

Letter from Barbara A. Kreisman, Chief, Video Services Division, Mass Media Bureau, Federal Communications Com-

<sup>3</sup> The Commission's mileage separation system for station transmitters operating on the same or adjacent channels is "the sole protection against inter-station interference." *WITN-TV v. FCC*, 849 F.2d 1521, 1525 (D.C. Cir. 1988).

mission, to Thomas Aube, University of Southern Colorado 2 (Feb. 28, 1991) (Kreisman Letter).

In September 1992 USC (which had yet to begin construction on Cheyenne Mountain) and appellant Sangre de Cristo, the licensee of commercial television station KOAA-TV, Channel 5,<sup>4</sup> sought to exchange channels pursuant to 47 C.F.R. § 1.420(h).<sup>5</sup> Under their proposal, the petitioners would exchange channels and USC would transfer its Cheyenne Mountain construction permit to Sangre de Cristo. In return, Sangre de Cristo would provide financial support to USC, donate a translator station to USC and transfer the existing licensed facilities of station KOAA-TV to USC.

In July 1993 the MMB released a Notice of Proposed Rule Making regarding the proposed channel exchange. *Amendment of Section 73.606(B), Table of Allotments, TV Broadcast Stations (Pueblo, Colorado)*, 8 F.C.C.R. 4752 (MMB 1993) (*Notice of Proposed Rulemaking* or *NPRM*). While noting that the proposal met several of the baseline requirements for a channel exchange under section 1.420(h),<sup>6</sup> the MMB insisted

<sup>4</sup> KOAA-TV, Channel 5, is licensed to Pueblo, Colorado and is a primary affiliate of the National Broadcast Corporation. The petitioners claim that "[a]lthough licensed to Pueblo, KOAA-TV historically has served Colorado Springs in addition to its community of license." Appellants' Br. at 7.

<sup>5</sup> Section 1.420(h) provides in part:

Where licensees (or permittees) of television broadcast stations jointly petition to . . . exchange channels, and where one of the licensees (or permittees) operates on a commercial channel while the other operates on a reserved noncommercial educational channel within the same band, and the stations serve substantially the same market, then the Commission may . . . modify the licenses (or permits) of the petitioners to specify operation on the appropriate channels upon a finding that such action will promote the public interest, convenience, and necessity.

<sup>6</sup> For example, both stations are within the same band and serve the same community of license, USC pledged to use the proceeds from the exchange solely to improve the service of its noncommer-

that the stations swap their *existing* sites only. *Id.* at 4754. The MMB's modification meant that neither station could relocate to the Cheyenne Mountain site. The MMB further noted that "although USC was granted a waiver for Station KTSC(TV) on Channel \*8 based in part on the need to continue providing public television service to Colorado Springs without relying on a translator to accomplish its goal, we do not believe it appropriate to determine at the rule making stage whether a similar request from a commercial licensee would be granted at the application stage." *Id.* at 4753 n.5. The appellants jointly objected to any alteration of their agreement, arguing that they satisfied the requirements for a channel exchange and that Sangre de Cristo's use of the Cheyenne Mountain site was crucial to their proposal. See Joint Comments of the University of Southern Colorado and Sangre de Cristo Communications, Inc., at 3; JA 44; Joint Reply Comments of the University of Southern Colorado and Sangre de Cristo Communications, Inc., at 4-5; JA 106-07.

In 1995 the MMB rejected the appellants' proposal to exchange channels. *Amendment of Section 73.606(B), Table of Allotments, TV Broadcast Stations (Pueblo, Colorado)*, 10 F.C.C.R. 7662 (MMB 1995) (*Report & Order*). The *Report & Order* stated:

Petitioners are correct in stating that the intraband channel exchange procedures of Section 1.420(h) of the Commission's Rules are available to permittees. However, we do not agree with petitioners' assertion that, merely because a permittee of an unbuilt station could be a party to a channel exchange, it therefore follows that a construction permit for the modification of licensed facilities "must" be transferred in connection with a channel exchange proposal. . . . Moreover, petitioners make far too much of the fact that the Commission recognized when it adopted Section 1.420(h) that intraband channel

cial station and the new or improved commercial and noncommercial broadcast service provides a public benefit. See *NPRM*, 8 F.C.C.R. at 4753 (applying the standards set forth in *Intraband Television Channel Exchanges*, 59 RR 2d 1455 (1986)).

exchanges could result in benefits for both noncommercial and commercial stations. This recognition does not mean, as petitioners suggest, that the Commission intended in adopting its channel exchange procedures to ensure a benefit for commercial stations. Indeed, the Commission clearly stated when it adopted Section 1.420(h) that its primary purpose in doing so was to enable noncommercial educational stations to improve their service. In upholding the channel exchange policy, the U.S. Court of Appeals for the District of Columbia Circuit also explained that the Commission adopted the policy "as a rescue effort for educational broadcasting in the wake of decreases in federal funding" and repeatedly referred in its opinion to the FCC's goal of promoting educational television . . . We assume that commercial stations will request channel exchanges with noncommercial stations when it is in their interest to do so, but Commission policy in no way requires that the commercial party to a channel exchange receive any particular benefit in order for the exchange to be in the public interest.

*Id.* at 7666 (internal citations omitted). Noting that "the grant of a minimum spacing waiver in connection with petitioners' request . . . would be inconsistent with well established Commission policy," the MMB reasoned that, "[a]bsent a demonstration of compelling need for departure from established interstation separation standards, the Commission will not grant a waiver of the minimum spacing rules for allotment purposes." *Id.* at 7667 (quoting *London, Kentucky*, 7 F.C.C.R. 5936, 5937 (MMB 1992)). The Bureau concluded that the "petitioners have not made a showing of compelling need to support their request for a short-spaced allotment" and "the public interest benefits that would be derived from the short-spaced allotment they seek are not large enough to outweigh the public interest benefit of the integrity of the TV Table of Allotments and the minimum spacing rules." *Id.*

The appellants then sought Commission review and in November 1996 the FCC upheld the MMB's denial of the

proposed channel exchange. *Amendment of Section 73.606(b), Table of Allotments, TV Broadcast Stations (Pueblo, Colorado)*, 11 F.C.C.R. 19,649 (1996) (*Memorandum Opinion & Order* or *MO&O*). The FCC noted that the appellants suffered from a “basic misunderstanding of our channel exchange policy and our short-spacing rules,” explaining that “while petitioners are correct that the channel exchange rule applies to construction permits as well as licenses, neither the rule nor the cases they cite *require* approval of the instant proposal which would result in a short-spaced commercial allotment.” *Id.* at 19,651 (emphasis added). The appellants argued, *inter alia*, that because the FCC had already determined that the technical difficulties in constructing a facility on Cheyenne Mountain were not so great as to deny a short-spacing waiver to USC, the FCC should therefore either transfer the pre-existing waiver to Sangre de Cristo or approve Sangre de Cristo for a waiver based upon the identical technical considerations. The FCC rejected the appellants’ arguments, noting that “the waiver granted to USC was also based upon the clear and substantial benefits to noncommercial, educational service which the relocation [to Cheyenne Mountain] would permit.” *Id.* at 19,652. The Commission stated that, “[b]ecause the educational station would no longer enjoy the benefits of the short spaced Cheyenne Mountain site under the subject channel exchange proposal, the [FCC] staff was required to determine anew, for a commercial station, whether a short spacing requirement would be appropriate.” *Id.* Because the appellants had made “no showing of compelling need or extraordinary circumstances . . . sufficient to outweigh the public interest benefit of observing the integrity of the TV Table of Allotments and the minimum spacing rules,” the FCC concluded:

We agree with the staff’s determination that the overall public interest is better served by denial of the waiver request and preservation of the integrity of the spacing requirements in this case. In weighing the public interest in this case, we also note that as many as 20,000 people or more would lose their only primary (*i.e.*, full-service, protected) commercial off-air service if the waiv-

er were granted and KOAA-TV were to change its transmitter site.

*Id.*<sup>7</sup>

USC and Sangre de Cristo now ask this Court to reverse the Commission’s *Memorandum Opinion & Order*.

## II.

We review FCC decisions “under the arbitrary and capricious review standard” and “do not ‘substitute [our] judgment for that of the agency’ but rather look to see ‘whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.’” *Freeman Eng’g Assocs., Inc. v. FCC*, 103 F.3d 169, 178 (D.C. Cir. 1997) (quoting *Motor Vehicles Mfrs. Ass’n of the United States, Inc. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

Here, however, it is unclear what the FCC believed to be the “relevant factors” in its ruling. It is undisputed that, before the 1991 waiver of the minimum spacing requirement granted to USC, the Commission did not take the commercial or non-commercial status of short-spacing waiver applicants into account. See, *e.g.*, Appellee Br. at 21 (“This case presented the Commission with an issue of first impression.”). But the waiver letter to USC signed by Barbara Kreisman, Chief of the MMB’s Video Services Division, was obscure on this point: it began by noting that the FCC was “mindful of the unique role played by many noncommercial television stations in providing public television service to wide areas” and then catalogued eight other factors supporting waiver, none of which it identified as dispositive. See Kreisman Letter, *supra*, at 2 (emphasis added). In apparent contrast, the MMB’s *NPRM* indicated that “USC was granted a waiver

<sup>7</sup> The FCC also found “unpersuasive petitioners’ argument that consideration of the noncommercial educational status of Station KTSC(TV) in granting the waiver violates the First Amendment.” *MO&O*, 11 F.C.C.R. at 19,653.

... based upon its stated need to continue providing *noncommercial* educational television service to Colorado Springs without relying on a translator to provide a viewable signal to that community." 8 F.C.C.R. at 4753 (emphases added). Even though the appellants' proposed channel swap would in fact enable USC to improve its service to the Colorado Springs community in conformity with 47 C.F.R. § 1.420(h), the FCC nevertheless concluded that "the public benefits that would be derived from the short-spaced allotment [the petitioners seek] are not large enough to outweigh the public interest benefit of the integrity of the TV Table of Allotments and the minimum spacing rules." *Report & Order*, 10 F.C.C.R. at 7667; *see also MO&O*, 11 F.C.C.R. at 19,652 ("We agree with the staff's determination that the overall public interest is better served by denial of the waiver request and preservation of the integrity of the spacing requirements in this case.").

We conclude that the FCC did not adequately explain why the "public interest benefit of the integrity of the TV Table of Allotments and the minimum spacing rules" would be outweighed by USC's short-spaced broadcasts but not by Sangre de Cristo's. The FCC may well decide to factor the commercial status *vel non* of an applicant into its short-spacing waiver decisions, as it appears to have done, or it may develop an alternative rule.<sup>8</sup> Whatever the Commission decides, it must better explain the basis for its action (particularly in light of its past practice which did not consider the commercial/noncommercial status of an applicant) than it has done.<sup>9</sup>

<sup>8</sup> In this regard, we note that the FCC enjoys "a broad measure of discretion in dealing with the many and complicated problems of allocation and distribution of service." *Television Corp. of Mich. v. FCC*, 294 F.2d 730, 733 (D.C. Cir. 1961).

<sup>9</sup> To the extent the Commission used a commercial/noncommercial distinction, it appears to be inconsistent with its earlier decision in *Applications of Open Media Corp.*, 8 F.C.C.R. 4070 (1993), which described its "policy of refusing to base waivers of rules designed to prevent interference upon non-technical considerations such as ownership or programming." *Id.* at 4071. The Commission did not even mention *Open Media* in its opinion below.

*See, e.g., Committee for Community Access v. FCC*, 737 F.2d 74, 77 (D.C. Cir. 1984) (Commission "cannot silently depart from previous policies or ignore precedent"). And if the FCC does elect to consider the commercial/noncommercial status of an applicant, it must ground its modification in a manner consistent with the First Amendment.

### III.

While we cannot say that "the agency's reasons for declining the waiver were 'so insubstantial as to render that denial an abuse of discretion,'" *Thomas Radio Co. v. FCC*, 716 F.2d 921, 924 (D.C. Cir. 1983) (citation omitted), at the same time we cannot discern with precision on what basis the FCC made its ruling. Indeed, the FCC conceded during oral argument that it had not definitively addressed the importance of the commercial/noncommercial status of a short-spacing waiver applicant. Accordingly, and for the reasons set forth above, we remand to the FCC for further proceedings consistent with this opinion.

*So ordered.*



**EXHIBIT B**

**ENGINEERING STATEMENT  
IN SUPPORT OF JOINT RESPONSE TO  
FEDERAL COMMUNICATIONS COMMISSION LETTER  
DATED AUGUST 10, 1998  
MM DOCKET NO. 93-191  
ON BEHALF OF  
UNIVERSITY OF SOUTHERN COLORADO AND  
SANGRE DE CRISTO COMMUNICATIONS, INC.  
SEPTEMBER 1998**

**COHEN, DIPPELL AND EVERIST, P.C.  
CONSULTING ENGINEERS  
RADIO AND TELEVISION  
WASHINGTON, D.C.**

COHEN, DIPPELL AND EVERIST, P. C.

City of Washington           )  
  ) ss  
District of Columbia        )

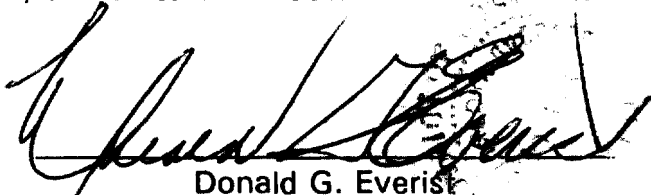
Donald G. Everist, being duly sworn upon his oath, deposes and states that:

He is a graduate electrical engineer, a Registered Professional Engineer in the District of Columbia, and is President of Cohen, Dippell and Everist, P.C., Consulting Engineers, Radio - Television, with offices at 1300 L Street, N.W., Suite 1100, Washington, D.C. 20005;

That his qualifications are a matter of record in the Federal Communications Commission;

That the attached engineering report was prepared by him or under his supervision and direction and

That the facts stated herein are true of his own knowledge, except such facts as are stated to be on information and belief, and as to such facts he believes them to be true.

  
Donald G. Everist  
District of Columbia  
Professional Engineer  
Registration No. 5714

Subscribed and sworn to before me this 16<sup>th</sup> day of September, 1998.

  
Notary Public

My Commission Expires: 2/28/2003

This engineering statement has been prepared on behalf of the University of Southern Colorado and Sangre de Cristo Communications, Inc. in support of their Joint Response ("Response") in MM Docket No. 93-191 to the Federal Communications Commission's letter dated August 10, 1998. In this docket, the parties have proposed an exchange of the University's Channel 8, on which KTSC(TV), Pueblo, Colorado, an educational facility, currently operates with Sangre de Cristo's Channel 5, on which KOAA-TV, Pueblo, Colorado, a commercial facility currently operates. Both stations currently operate from the same transmitter site.

The following information has been prepared to provide the information requested by the FCC letter.

Figure 1 is a map showing the Grade B contours of KOAA-TV with its current licensed facilities and KOAA-TV with facilities after the channel exchange with the construction permit, BPET-900122KE using a Jampro antenna and that specified in the application, BMPET-931129KE using a Dielectric antenna.

Figure 1(a) provides a tabulation of the channel, effective radiated power, height above average terrain and transmitter coordinates for the facilities shown on Fig. 1.

Figure 1(b) is a tabulation showing the loss and gain areas with the 1990 population and area determinations for Figure 1.

Figure 1(c) is a map showing the Grade B contours of KOAA-TV, Ch. 5 license, KOAA-TV, Ch. 8 CP, Jampro and KOAA-TV, Ch. 8 App. Dielectric with zip codes.

Figure 1(c)(1) is a tabulation of DBS service available to zip code areas in the loss areas.

Figure 2 is a map showing the Grade B contours of KOAA-TV current licensed facilities and the KOAA-TV facilities after the channel exchange with (1) the construction permit, BPET-900122KE, using the Jampro antenna and (2) that specified in the application, BMPET-931129KE using a Dielectric antenna with all other predicted Grade B services that serve the gain and loss areas

Figure 2(a) provides a tabulation of the channel, effective radiated power, height above average terrain and transmitter coordinates for the KOAA-TV facilities shown on Fig. 2.

Figure 2(b) provides all other full-power Grade B television services (including KTSC(TV) with post channel exchange facilities) providing service to the loss and gain areas, and a listing for each such station for the following:

- Channel
- Call letters
- Status
- ERP
- City/State
- HAAT

Figure 2(b)(1) provides the 1990 population data for full-service TV to the loss area.

Figure 2(b)(2) is a tabulation of the percentage of other predicted Grade B services to the KOAA-TV licensed facilities from other full-service TV stations.

Figure 2(b)(3) is a tabulation of the percentage of other predicted Grade B services to the KOAA-TV predicted Grade B service area using the Channel 8 construction permit, BPET-900122KE, facilities with a Jampro antenna.

Figure 2(b)(4) is a tabulation of the percentage of service of other predicted Grade B services to the KOAA-TV predicted Grade B service area on Channel 8 with the facilities specified in application BMPET-931129KE.

Figure 2(c) is a map showing the existing translator service to the KOAA-TV loss area.

Figure 2(c)(1) is a tabulation of the existing translator service showing the authorized facilities.

Figure 2(c)(2) is a tabulation of the existing translator coverage by population in the KOAA-TV loss areas.

Figure 2(d) is a map showing existing and proposed translator service to the KOAA-TV loss area.

Figure 2(d)(1) population between KOAA-TV Channel 5 license facilities and KOAA-TV Channel 8 CP facilities with existing and proposed translator service.

Figure 2(d)(2) population between KOAA-TV Channel 5 license facilities and KOAA-TV Channel 8 application facilities with existing and proposed translator service.

| <u>Community</u> | <u>Assumed Channel</u> |
|------------------|------------------------|
| La Junta         | 22                     |
| Cheraw           | 17                     |
| La Veta          | 16                     |
| Canon City       | 29                     |
| Villa Grove      | 26                     |

Figure 3 is a map showing the KTSC Grade B contour for its current licensed facilities on Channel 8 and the KTSC predicted Grade B contour with facilities on Channel 5 after channel exchange.

Figure 3(a) is a tabulation which lists the channel, effective radiated power, height above average terrain and coordinates for the coverages shown on Figure 3.

Figure 3(b) is the loss and gain areas with 1990 populations and areas determination for Figure 3.

Figure 4 is a map of the predicted Grade B contour for the KTSC(TV) current licensed facilities on Channel 8 and the KTSC facilities on Channel 5 after the channel exchange with other predicted Grade B services to the gain and loss areas.

Figure 4(a) is a tabulation of the channel, effective radiated power, height above average terrain and the transmitter coordinates for KTSC(TV) facilities shown in Figure 4.

Figure 4(b) is a tabulation of all other full-power facilities of predicted Grade B television services providing service to the loss and gain areas, including a listing of each station:

- Channel
- Call letters
- Status
- ERP
- City/State
- HAAT

Figure 4(b)(1) is a tabulation showing the percentage of service of other predicted Grade B services to the Channel 8 KTSC(TV) licensed operation.

Figure 5 is a map showing the predicted Grade B service resulting from KTSC using its current licensed facilities and with KTSC using the facilities after the channel swap with Western Slope translators (present, authorized and pending).

Figure 5(a) is a tabulation of the channel, effective radiated power, height above average terrain and transmitter coordinates for those facilities shown in Figure 5.

Figure 5(b) is the translator service (proposed, application, and licensed) for the Western Slope, including population and coverage area.

| <u>Community</u>    | <u>Proposed Channel</u> |
|---------------------|-------------------------|
| Cortez Red-Mesa, CO | 64                      |
| Grand Junction, CO  | 21*                     |
| Durango, CO         | 29                      |
| Ignacio, CO         | 15                      |

\*Non-commercial TV service is now being provided by KRMJ(TV), Grand Junction, CO, Ch. 18 186 kW Max. DA 3050 meters

Figure 6) is a map of predicted coverage of K30AA to Colorado Springs, CO.

Figure 6(a) provides a tabulation of the facilities for K30AA

Figure 6(b) provides a tabulation of the 1990 population and area covered by K30AA.

The service areas have been computed every ten degrees and are based upon the appropriate propagation curves provided in Section 73.699 of the FCC Rules. The population data is based on the 1990 Census. The population within the coverage contour was determined by employing a computer program using the 1990 Census data as provided by the United States Bureau of the Census. The computer program overlaid the Grade B contour over the land area in the State of

Colorado and determined the population within the contour by using centroids for the pertinent census blocks. The land area was measured with a polar planimeter using the original map of the coverage.

Since the KOAA-TV transmitter site will be moved to the north, there will be some loss of service after the channel exchange in rural areas on the fringe of the current Grade B contour. Using the construction permit facilities, the population in the loss area will be 1,322 persons after the LPTV/TV translator service is considered but excluding considerations of cable and DBS service. Using the facilities proposed in the application on file, the population in the loss area will be 1,055 persons. The proposed population gain for KTSC-TV's Channel 5 operation over its Channel 8 operation is 5,324 persons. Thus, there is a net gain in off-air service resulting from the exchange. The net gain assuming construction of the permit facilities is 4002 persons and for the application facilities is 4269 persons excluding the proposed Western Slope translators and K30AA.

A study has been made of the K30AA DTV allocation situation to ascertain whether or not it would be considered a displacement candidate<sup>1</sup> in view of the action taken in the "Matter of Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service" in

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<sup>1</sup>From the Memorandum, Opinion and Order in Reconsideration, Para. 116, FN 79, "Low power stations will be allowed to apply for displacement relief if their operations would be impacted by one or more allotments in the DTV Table. We will assume that a low power station is impacted if the spacing between the low power station and a DTV allotment is less than the following distances: Stations on UHF channels - 265 km (162 miles); Stations on VHF Channels 7-14 - 260 km (159 miles); Stations on VHF Channels 2-6 - 280 km (171 miles). Engineering showings of predicted interference may also be submitted to justify a need for displacement relief".



MM Docket 87-268, Memorandum, Opinion and Order in Reconsideration of the Sixth Report and Order adopted Feb. 17, 1998 ("Memorandum, Opinion and Order in Reconsideration").

The only allocation impediment to continued operation of K30AA after DTV conversion would result from the FCC's apparent allotment of DTV Channel 30 to La Junta, Colorado.<sup>2</sup> It is unclear why the Commission allotted this channel to La Junta given that the only NTSC allotment to La Junta, Channel 22, is vacant. The Channel 30 DTV allotment in La Junta is located 223.7 km from the K30AA transmitter site and therefore would be short-spaced to K30AA by 80.6 kilometers. Even if the allotment is activated, it is not expected that the DTV facility would cause or receive more than *de minimis* interference to and from K30AA.<sup>3</sup>

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<sup>2</sup>No corresponding allotment is found in the B Table of the Sixth Memorandum, Opinion and Order on Reconsideration

<sup>3</sup>It is noted that La Junta NTSC Ch. 22 reference coordinates are 143.1 km from the DTV Ch. 22 allotment for KXRM-DT, Colorado Springs see B-8 of the Sixth Memorandum, Opinion and Order in Reconsideration.